No. 59

IN THE

Supreme Court of the United States

OCTOBER TERM, 1963

BOARD OF TRADE OF THE CITY OF CHICAGO,
Appellant,

vs.

UNITED STATES, ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS

REPLY BRIEF OF APPELLANT BOARD OF TRADE OF THE CITY OF CHICAGO

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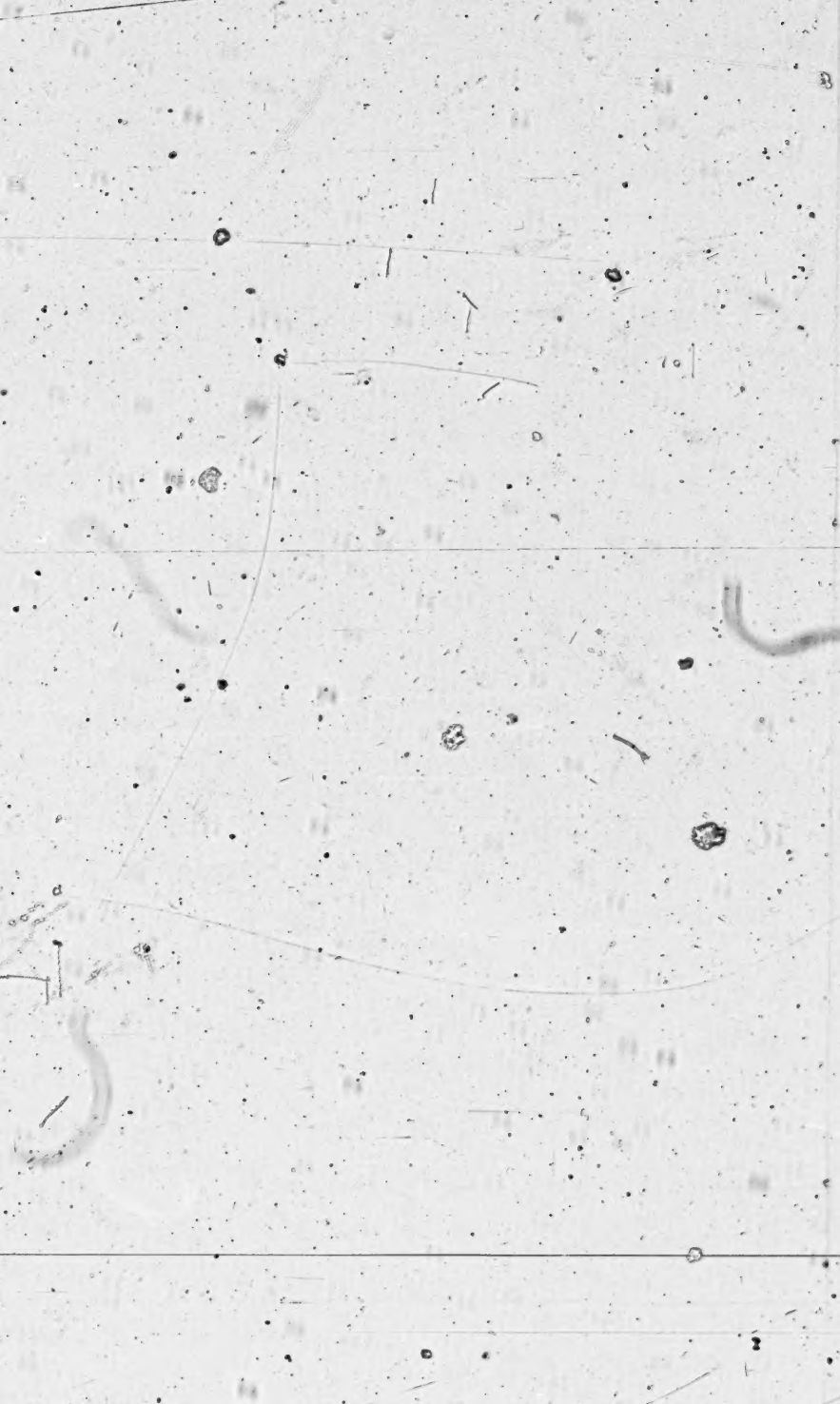

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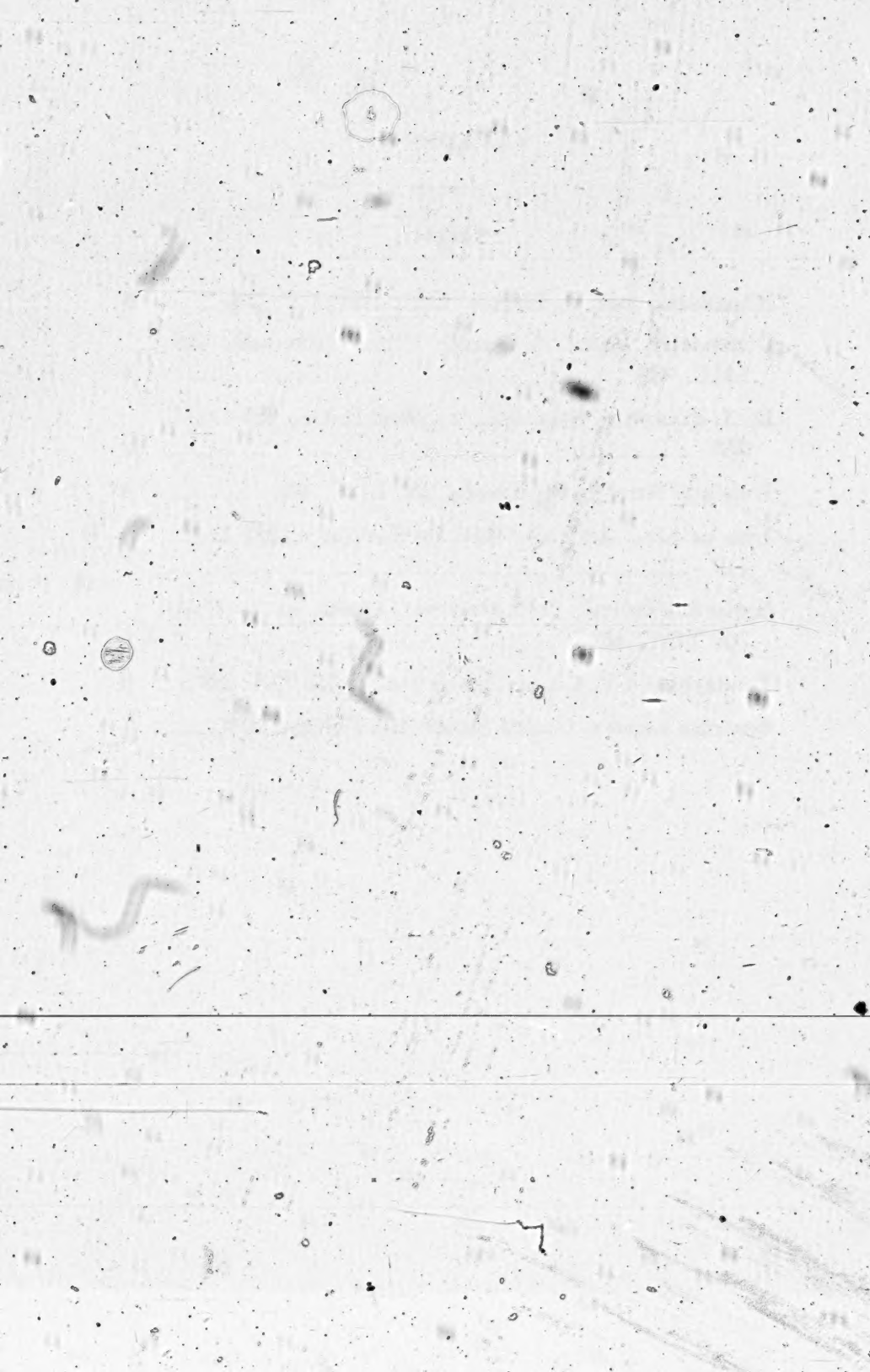

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The Board of Trade of the City of Chicago (Board of Trade) is concerned with only the one question raised by this appeal:

> May the Interstate Commerce Commission, over the protest of affected shippers and localities, authorize rail carriers to maintain rates which depart from the long-and-short-haul requirement of section 4 of the Interstate Commerce Act, without considering and

> determining whether such fourth-section-departure rates would violate section 3(1) of the Act by causing undue prejudice against such shippers and localities?

It is the position of the Board of Trade that the answer to that question is "no".

The United States, the statutory defendant in the court below, is nominally an appellee; but, as we understand the position of the United States, it supports generally the position taken by the Board of Trade. The appellees who oppose the position of the Board of Trade are the Interstate Commerce Commission (the Commission), the New York Central Railroad Company (NYC) and McNabb Grain Company, et al (McNabb). While most of the contentions urged by appellees have been considered in appellant's brief, certain features of appellees' arguments require brief discussion by appellant.

I

In order for the Commission to enter an affirmative order relieving the railroads from the long-and-short-haul requirement of section 4 of the Interstate Commerce Act, the Commission must find that a "special case" exists. Neither the original Act to Regulate Commerce nor any subsequent amendment thereof has ever defined more specifically the criteria for determining what constitutes a special case. All that Congress has done is to specify certain situations in which the Commission may not grant fourth-section relief. Thus the Commission may not grant relief if the charge to or from the more distant point "is not reasonably compensatory for the service performed," and it may not grant relief "on account of merely potential water competition not actually in existence." But Congress has never indicated to the Commission that it *should* grant fourth-section relief simply because the rate proposed would be compensatory and the competition actual.

Appellees are unable to answer, either with authority or reason, appellant's contention that, in determining whether a "special case" exists to justify fourth-section relief, the Commission must take into consideration the standards of the other sections of the Act. Appellees' arguments on this point consist solely of assertions that, in a section 4 investigation, the Commission need not consider alleged violations of section 3. Thus their briefs contain many such statements as the following:

> . . . a fourth section proceeding which is limited to determining whether a carrier should be authorized to establish reduced through charges to the more distant points and to maintain higher through charges to intermediate points . . . (Comm. Br., p. 3)

> . . . the Commission is not required to make a final determination in respect to the lawfulness of the rates under other sections of the Act in a hearing limited, as this one was, to the railroads' fourth section application . . . (NYC Br., p. 20)

Such statements beg the question. The question is: Can a fourth-section investigation lawfully be so limited so as to deny to affected shippers and localities their right to present evidence of prejudice and discrimination and to have the Commission act on that evidence?

Faced with the fundamental question of what the carriers must show in order to establish a special case, the NYC simply ignores the question, and the Commission is reduced to the point of arguing that the carriers establish a special case simply by showing that they are confronted with "compelling competition" (Comm. Br., p. 40).

The only reasonable interpretation of the statute, confirmed by many decisions of this Court and of the Commission itself, is that the carriers do not make out a special case simply by proving the existence of actual competition, if the rates they seek to establish would be unlawful under some other section of the Act, and specif-

ically, if such rates would be discriminatory or prejudicial to competing shippers or localities in violation of section 2 or section 3. If there were any doubt that such is the correct interpretation of section 4, that doubt must necessarily be dispelled by the national transportation policy, which provides that all the provisions of the Act shall be administered and enforced with a view to carrying out that policy. The policy specifically requires the Commission to encourage the establishment of reasonable charges "without unjust discriminations, undue preferences or advantages, or unfair or destructive competitive practices."

II.

Appellees argue that the cases cited by the Board of Trade should be interpreted to mean that the Commission will consider section 3 issues in a section 4 investigation only when such issues involve the relationship between the long-haul rate and an intermediate short-haul rate (Comm. Br., pp. 33-34; NYC Br., pp. 43-44).

The Commission itself has not so interpreted section 4. For example, in *Bituminous Coal to Buffalo, N. Y.*, 219 I.C.C. 554 (1936), the Commission conducted its investigation solely under section 4 and the protesting shippers were not located at intermediate points. The Commission denied relief on the ground that it would not be consonant with other provisions of the Act.[1] *Nepheline Syenite from*

[1] The NYC omitted this case and two others, *Iron and Steel To Minnesota*, 231 I.C.C. 425 (1939), and *Commodity Rates to Pacific Coast Terminals*, 107 I.C.C. 421 (1926), when it attempted to categorize the cases cited by appellant (NYC Br., pp. 47-48, footnotes 19-23). Appellees cannot deny that the Commission has adhered to the practice of considering section 3(1) issues in section 4 investigations prior to this case. Separation of the many cases into the different categories suggested by the NYC brief only serves to demonstrate the consistency of the Commission's rulings up to the present case.

Ontario, Canada, to the East, 308 I.C.C. 561 (1959), was also an investigation solely under section 4 of the Act in which the protesting shippers were not located at intermediate points. In that case the Commission authorized the relief requested after making subsidiary findings that relief was justified in the circumstances.

There is nothing in the many decisions of this Court or the Commission cited in appellant's brief which in any way suggests that the plain language of section 4 is to be construed as applying only in cases where an intermediate shipper is involved. And the distinction attempted to be made by appellees is one which could never be applied in practice. The Commission was not here dealing with one rate adjustment over the direct routes and another adjustment over the circuitous routes. The Commission had before it a single, integrated, and complex rate adjustment, under which shippers operating over many different routes were competing with each other. The Court can well imagine what would happen if the Commission tried to apply the rule suggested by its counsel that shippers located at intermediate points can, in a fourth-section investigation, raise issues of undue prejudice under section 3 but shippers on circuitous routes cannot raise such issues.

III.

The Commission seems to argue that the July 11, 1957, amendment to section 4 has a bearing on the issues here, but it is not clear to us just what effect the Commission seeks to attach to this amendment.[2] That amendment

[2] The Commission's statement (Comm. Br., p. 22, footnote 21) that the amendment reinstated regulation as it existed prior to the Mann-Elkins Act is wholly erroneous. See B.O.T. Br., pp. 15, 20).

simply provided that carriers operating over circuitous routes need secure no relief to establish charges which would otherwise violate section 4 if such charges were for the purpose of meeting charges in effect over a more direct route. It did not change in any way the proscription of charging more for a shorter haul than for a longer haul; it did not change in any way the Commission's right to grant relief from that requirement "in special cases"; and it did not establish any different criteria than had previously existed for determining what constitutes a special case. Furthermore, it contains no language which suggests or implies in any way that Congress intended to immunize fourth-section-departure rates from unlawfulness under other sections of the Act.[3] That the Commission itself has not interpreted the 1957 amendment as changing the law in this respect is shown by *Nepheline Syenite from Ontario, Canada, to the East*, 308 I.C.C. 561 (1959), *supra*, which, as we have pointed out, was solely an investigation under section 4 and the protesting shippers were not located at intermediate points.

IV.

Appellees accuse the Board of Trade of seeking a monopoly of the traffic in question (NYC Br., p. 23; McNabb Br., p. 9). Nothing could be further from the truth. The Board of Trade is a vigorous supporter of free competition subject to the fewest possible restraints. It believes that all forms of transportation should have a fair opportunity to compete for traffic, and

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[3] The original publication of rates, effective December 15, 1956, antedated the July 11, 1957, amendment. At that time, the carriers required relief over circuitous as well as direct routes. So regardless of the effect of the 1957 amendment, the December 15, 1956, publication was in violation of section 4 via all routes, direct or circuitous.

it actively supports their right to do so. It was, and is, entirely sympathetic to the efforts of the railroads to meet their competition (R. 292, 795). But the Board insists that the railroads must meet their competition in a lawful manner. The milling-in-transit limitation is a gross discrimination against Chicago and Chicago grain merchants, because it precludes them from buying corn off the Kankakee Belt line, and makes that area the private buying preserve of the Kankakee processor and a few other processors who route their traffic through Kankakee. It is those processors who seek a monopoly of the corn off the Kankakee Belt. The Board of Trade seeks to eliminate that monopoly so that all corn buyers, including Chicago grain merchants, can buy and transport corn off the Kankakee Belt on an equality with the now unduly preferred processors.

V.

Appellees admit that the Commission did not rule upon the Board of Trade's contentions that the proposed rates would violate section 3 (Comm. Br., p. 37; NYC Br., p. 27).[4] Nevertheless, they devote a substantial amount of their

[4] Indeed, the Commission has now unequivocally committed itself to the position that it will not consider, in a section 4 investigation, whether the fourth-section-departure rates would result in violations of section 3. *Iron or Steel Articles—East to Southwest*, 321 I.C.C. 419. The decision in that case, released January 17, 1964, was the aftermath of the decision in *Seatrain Lines* v. *United States*, 168 F. Supp. 819 (1958). After the decision of the three-judge court, the Commission suspended the rates. It is interesting to note that, although the proceeding bears an investigation and suspension docket number, the Commission held that it was not "an investigation pursuant to the provisions of sections 13 or 15" since the rates were suspended because of the court's order and therefore the Commission was "precluded from consideration of discrimination against carriers, which is prohibited by section 3(4)." 321 I.C.C. at 422.

briefs to dealing with the merits of the Board of Trade's contentions. Since the merits of the issue are not before the Court, we will not deal with those points in any detail.

The Commission says that, to establish preference and prejudice, it must be shown that different rates are charged for substantially similar services under similar transportation conditions and that such disparity has injured the prejudiced party and benefited the preferred party (Comm. Br., p. 35). The Board of Trade made such a showing. The disparity of rates is admitted. The movement of "free" (non-CCC) corn to Chicago from Kankakee Belt origins fell from 273 cars in the 10-month period before the restricted fourth-section departure rates became effective to only 46 cars for the same period after such rates became effective (Ex. 49, p. 6), even though the total cars of corn originated on the Kankakee Belt were many times greater after the fourth-section-departure rates became effective. And the NYC witness admitted that the same competitive conditions apply to whole corn as apply to processed corn (R. 367).

The Commission tries to obfuscate the section 3(1) issue by arguing that the Board of Trade's showing was not sufficient because the milling-in-transit limitation applied equally to the Kankakee shipper of whole corn as well as to the Chicago shipper (Comm. Br., p. 36). But the Kankakee shipper does not ship whole corn. He ships corn products. Because he is a processor the milling-in-transit requirement does not hurt him. On the contrary, it helps him by precluding the Chicago grain merchants from buying corn off the Kankakee Belt. The railroads have no right to make this kind of a restriction to benefit a small group of processors. Their duty is to haul the corn for everybody on non-discriminatory rates. It is not within their

province to say who shall be allowed to buy corn originating on the Kankakee Belt. In *D. A. Stickell & Sons, Inc.*, v. *Alton R. Co.*, 255 I.C.C. 333, 337 (1943) the Commission said:

> It is not the province of railroads to determine what markets shall be available to sellers or buyers, or, by the refusal to establish through routes or the maintenance of rate disadvantages, to restrict or circumscribe the opportunities to shippers located on other railroads to sell in markets served by them. It is their function to transport in the channels necessitated by trade conditions and not to fix limitations on commerce. The public interest demands that all shippers be accorded relatively equal opportunities to reach all reasonably available markets.

The order of the Commission in that case was affirmed by this Court in *Pennsylvania R. Co.* v. *United States*, 323 U.S. 588 (1945).

Respectfully submitted,

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